

FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

MUR 6989

DATE COMPLAINT FILED: November 30, 2015

DATE OF NOTIFICATION: December 2, 2015

DATE OF LAST RESPONSE: May 19, 2016

DATE ACTIVATED: June 1, 2016

ELECTION CYCLE: 2016

EXPIRATION OF SOL: October 9 - November 5, 2020

COMPLAINANT: American Democracy Legal Fund

RESPONDENTS: Benjamin Carson
Carson America, Inc. and Logan D. Delany, Jr.,
in his official capacity as treasurer
Penguin Random House LLC d.b.a. Sentinel

RELEVANT STATUTES
AND REGULATIONS: 52 U.S.C. § 30116(a)
52 U.S.C. § 30116(f)
52 U.S.C. § 30118(a)
11 C.F.R. § 100.52
11 C.F.R. § 106.3
11 C.F.R. § 110.1(g)
11 C.F.R. § 110.9
11 C.F.R. § 114.1(a)(1)
11 C.F.R. § 114.2

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaint in this matter alleges that 2016 presidential candidate Benjamin Carson and his authorized campaign committee, Carson America, Inc. and Logan D. Delany, Jr. in his official capacity as treasurer (the "Committee"), (collectively the "Carson Respondents") accepted prohibited or excessive in-kind contributions from Penguin Random House LLC ("Penguin") when Penguin paid for campaign-related expenses during the promotional tour for

1 Carson's new book, *A More Perfect Union: What We the People Can Do to Reclaim Our*
2 *Constitutional Liberties* ("*A More Perfect Union*").¹ Relying on news accounts, the Complaint
3 alleges that Carson (1) made campaign-related statements during the book tour; (2) improperly
4 scheduled or "sandwiched" campaign events between book tour events; and (3) accepted a \$500
5 campaign contribution at a book tour stop, resulting in violations of the Federal Election
6 Campaign Act of 1971, as amended (the "Act").²

7 Respondents deny the allegations. Penguin asserts that its promotional activities were
8 bona fide commercial activity, and both Penguin and the Carson Respondents argue that
9 Penguin's payment for those activities also qualified for the media exemption.³ Further, the
10 Carson Respondents state that the book tour was conducted in compliance with the terms of a
11 formal written contract with Penguin which mandated separation between book and campaign
12 activities,⁴ and that Penguin's payments to Carson are not contributions, but compensation for
13 bona fide employment independent of his candidacy.⁵ While the Carson Respondents
14 acknowledge that Carson conducted campaign activity during the month in which he participated
15 in the book tour, they assert that campaign events were kept separate from book tour events and

¹ Compl. at 6 (Nov. 30, 2015); *see* 52 U.S.C. §§ 30116(a), 30118(a).

² Compl. at 3, 5.

³ Penguin Resp. at 2, 5 (Dec. 18, 2015); Carson Resp. at 20-23 (May 23, 2016); Supp. Carson Resp. at 2 (Dec. 23, 2016).

⁴ Carson Resp. at 13.

⁵ *Id.* at 7.

1 the Committee paid for expenses for campaign-related meetings pursuant to the Commission's
2 allocation and mixed-use travel regulations.⁶

3 As set forth below, while the factual record indicates Carson discussed his candidacy at
4 some of the media appearances promoting his book, Penguin's payments for the book tour are
5 covered by the media exemption. And to the extent that any purely campaign-related activities
6 occurred during the time that Carson engaged in the book tour, those activities appear to have
7 taken place during Carson's unscheduled personal time, the Committee appears to have paid for
8 any related costs, and any costs of those activities not covered by the Committee appear to be *de*
9 *minimis*. Accordingly, we recommend that the Commission exercise its prosecutorial discretion
10 and dismiss the allegations that Penguin made, and the Carson Respondents accepted, prohibited
11 or excessive contributions in violation of 52 U.S.C. §§ 30116(a) and (f) or 30118(a).⁷

12 II. FACTUAL BACKGROUND

13 On May 15, 2015, Dr. Benjamin Carson filed a Statement of Candidacy with the
14 Commission for the 2016 presidential election, designating Carson America, Inc. as his principal
15 campaign committee. Carson continued his campaign until March 4, 2016, when he announced
16 suspension of his presidential campaign.

17 Almost a year prior to declaring his candidacy, Carson, who is a retired pediatric
18 neurosurgeon, lecturer, and bestselling author,⁸ entered into a book contract with Sentinel, a

⁶ *Id.* at 12-13, 15-16.

⁷ *See Heckler v. Chaney*, 470 U.S. 821 (1985).

⁸ Carson Resp. at 1; Audrey Jones Decl. ¶¶ 4, 5, 6 ("Jones Decl."). Carson has authored a number of books, including several bestsellers: *GIFTED HANDS* (1992), *THINK BIG* (1996), *THE BIG PICTURE* (2000), *TAKE THE RISK* (2009), *AMERICA THE BEAUTIFUL* (2013), *ONE NATION* (2014); and *A MORE PERFECT UNION* (2015). Jones Decl. ¶¶

1 subdivision of Penguin Random House LLC.⁹ Penguin Random House LLC is one of the
2 world's largest English-language general trade book publishers and includes a number of
3 publishing groups and their imprints, including Sentinel.¹⁰ Sentinel is "a dedicated conservative
4 imprint," which "publishes a wide variety of right-of-center books on subjects like politics,
5 history, public policy, culture, religion, and international relations."¹¹

6 Penguin released Carson's book, *A More Perfect Union* on October 6, 2015,¹² while
7 Carson was in the midst of his presidential campaign. The book ranked third on the New York
8 Times Bestsellers List for the week ending October 24, 2015¹³ and remained on the List through
9 November 2015.¹⁴ According to Penguin, the book did not discuss the 2016 election but focused
10 on Carson's views on the current status of the United States.¹⁵

11 **A. Promotion of *A More Perfect Union***

12 Carson's book contract required him to participate in a promotional book tour for a three
13 week period subsequent to the book's publication.¹⁶ The tour was held October 4, 2015 through

4, 5; Sealy M. Yates Decl. ¶¶ 7, 8, 9 ("Yates Decl."). Carson is currently the United States Secretary of Housing and Urban Development.

⁹ Carson Resp. at 3-4. The contract was actually entered into between Sentinel and American Business Collaborative ("ABC"), a Florida-based LLC that serves as "pass-through entity for [Carson's] public speaking and book royalties." *Id.* at 1, 3-4.

¹⁰ Penguin Resp. at 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *See Best Sellers, Hardcover-Nonfiction, NEW YORK TIMES* (Nov. 29, 2015).

¹⁵ Penguin Resp. at 2.

¹⁶ Carson Resp. at 4; Yates Decl. ¶ 12.

1 November 6, 2015,¹⁷ and included stops in 38 cities and in 10 states — South Carolina, Georgia,
2 Tennessee, Texas, Iowa, Florida, Kansas, Oklahoma, Nebraska, Missouri, and Washington,
3 D.C.¹⁸ During the book tour, Carson attended book signings, spoke to the press, and appeared as
4 a guest on various radio and television shows.¹⁹ Penguin organized and paid for the book tour
5 and other promotional activities including a website promoting the book, the tour bus, and
6 Carson's travel expenses.²⁰

7 According to Penguin, the book tour was organized to promote Carson's book and not his
8 campaign.²¹ Penguin explains that the book tour was structured with a book tour week
9 alternating with an off week to clearly separate book time from campaign time.²² During the
10 book tour weeks, Penguin paid "all of [Carson's] travel related expenses and controlled the
11 schedule, leaving only small blocks of time unscheduled."²³ Carson campaign staff were barred
12 from traveling with Carson on the book tour bus or attending events, and contact with them was
13 limited to logistical scheduling.²⁴ Security was instructed to evict anyone attempting to

¹⁷ *Id.*

¹⁸ Penguin Resp. at 2.

¹⁹ *Id.* at 3; Carson Resp. at 4; Yates Decl. ¶ 12.

²⁰ Penguin Resp. at 2.

²¹ *Id.* at 3.

²² *Id.* Penguin also states that it decided to schedule the book tour with alternating weeks for the campaign activities because of the Commission's lack of consensus on whether a candidate may host fundraising events in cities where the book publisher paid the candidate's travel costs to promote the book. *Id.* at 3 n.3 (citing Advisory Op. 2011-02 (Brown)).

²³ *Id.* at 3.

²⁴ *Id.*

1 distribute campaign materials or obtain contact information from individuals at book signings.²⁵
2 In a National Public Radio ("NPR") interview in which Carson was asked specifically about
3 scheduling the book tour during his campaign, he explained that the events would be scheduled,
4 staffed, and paid for separately, but observed that to a certain extent anything a candidate does
5 during a campaign likely will be viewed as campaigning.²⁶

6 Penguin also asserts that none of the promotional activities it paid for, including the
7 book's promotional website, the tour bus, and events, referenced the candidacy.²⁷ Carson and
8 his literary agent, Sealy Yates, were specifically instructed that appearances and interviews were
9 to be limited to discussion of the book, not the campaign, and that Carson should redirect
10 campaign questions back to the book.²⁸

11 However, during Carson's media appearances, he was frequently introduced as both
12 presidential candidate and author of his book. And in the course of the book tour, Carson made
13 statements such as: "I don't want to be the establishment candidate"²⁹ and "[I] welcome the
14 opportunity to run against either" Hillary Clinton or Joe Biden for President.³⁰ Carson also

²⁵ *Id.*

²⁶ See Compl. at 3-4 (citing Sam Sanders, *Ben Carson Book Tour Blurs the Line between Business and Politics*, NPR (Oct. 21, 2015), <http://www.npr.org/2015/10/21/450611700/ben-carson-book-tour-blurs-the-line-between-business-and-politics>). In the interview Carson noted: "Honestly, anything that you do when you're running for president is campaigning, to a sense, because it's going to be seen that way." *Id.*

²⁷ Penguin Resp. at 3.

²⁸ *Id.*

²⁹ See Compl. at 3 (citing Gideon Resnick and Betsy Woodruff, *Did Ben Carson Already Break Campaign Law?*, THE DAILY BEAST (Oct. 19, 2015), <https://www.thedailybeast.com/did-ben-carson-already-break-campaign-law> (quoting Carson's October 6, 2015 appearance on Fox News' *Fox & Friends*)).

³⁰ See Megan Apper and Andrew Kaczynski, *Ben Carson: Hillary Clinton Won't Be Nominee Because She "Can Well Be in Jail" Soon*, BUZZFEED NEWS (Oct. 22, 2015) (quoting Carson's October 21, 2015 appearance on Fox News Radio's The John Gibson Show and providing recording of interview).

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1 answered questions about his general policy views including what actions he would take as
2 President of the United States. For example, on October 9, 2015, Carson appeared as a featured
3 speaker to promote the book at a National Press Club event entitled, "NPC Luncheon with Dr.
4 Ben Carson, Author and Republican Presidential Candidate."³¹ At this event, Carson made
5 statements about the policies that he would implement as President, including "under a Carson
6 administration, if another country attacks us with a cyber attack, they're going to get hit so hard,
7 it's going to take them a long time to recover."³² He also answered questions about how he
8 would act in specific situations if elected President.³³

9 **B. Campaign Events Conducted During Month of Book Tour**

10 Respondents acknowledge that Carson did not suspend campaigning during the month of
11 the book tour but contend that the book tour events were kept separate from campaign events.
12 As already noted, Penguin asserts that the duration of the book tour was three weeks total, but it
13 was scheduled on alternate weeks to separate book time from campaign time.³⁴ Further, the
14 Carson Respondents state that the bulk of the book tour was spent on promotion of the book
15 except for several occasions when Carson used his limited scheduled personal time between
16 book tour events to meet with individuals to discuss campaign issues and activities.³⁵ Carson
17 asserts that all expenses related to such meetings were paid for by the Carson campaign pursuant

³¹ Compl. at 3; Carson Supp. Resp. at Ex. 2.

³² Carson Resp., Ex. 3 at 9; *see also* Compl. at 2 n.8 (citing National Press Club, "National Press Club Luncheon with Ben Carson – Transcript" at 9, Oct. 9, 2015, https://www.press.org/sites/default/files/20151009_carson.pdf).

³³ Compl. at 3-4; Carson Resp., Ex. 3 at 10-16.

³⁴ Penguin Resp. at 3.

³⁵ Jones Decl. ¶ 12.

1 to protocols, applicable advisory opinions, and mixed use travel regulations at 11 C.F.R.
2 § 106.3,³⁶ but provides no details about the date and time of those meetings or how expenses
3 were apportioned and reported. The Committee reported spending over \$700,000 on travel-
4 related expenses during the book tour period, but it is unclear which, if any, of these
5 disbursements were made in connection with campaign expenses that were incurred on days of
6 the book tour.³⁷

7 Although none of the respondents provided a schedule of events, available information
8 generally confirms the alternate week arrangement referenced by Penguin. During the first week
9 of the book tour (October 5-11, 2015), Carson participated in book tour events by appearing on
10 cable news television and radio shows, and attending the National Press Club Luncheon on
11 October 9 and book signing events on October 10 and 11. It does not appear that book tour
12 events were held on October 12-17. Book signing events resumed the following week (October
13 18-25), followed by another break October 26-31, and finished with a week of book signing
14 events November 1-5.

15 During the two weeks in between the book tour (October 12-17 and October 26-31),
16 Carson apparently appeared at campaign-related events, *e.g.*, the CNBC Presidential Debate on
17 October 28, a campaign speech at Colorado Christian University on October 29, a campaign rally
18 at West Memphis High School on October 30, and a private fundraiser on October 31.³⁸ We
19 note that we identified one day, October 18, 2015, on which Carson attended a campaign event

³⁶ Carson Resp. at 12-14; Jones Decl. ¶¶ 12-15.

³⁷ See Carson America Amend. 2015 Year-End Report (March 28, 2016).

³⁸ Through online searches, we found references to Carson campaign luncheons and fundraisers during the week of October 12-17, but no indication that Carson attended those events. We have no information on Carson's activities during that week.

1 on the same day as book tour events. On that day, Carson made book tour stops in Houston, The
2 Woodlands, and San Antonio, Texas, and also participated in a North Texas Presidential Forum
3 at Prestonwood Baptist Church in Plano.³⁹ In addition, we have identified three media
4 appearances where Carson discussed his candidacy, but not the book, on days that he participated
5 in the book tour.⁴⁰

6 III. LEGAL ANALYSIS

7 A. Penguin's Payments for the Promotion of the Book Are Covered by 8 the Media Exemption 9

10 The Act defines the terms "contribution" and "expenditure" to include any gift of money
11 or "anything of value" for the purpose of influencing a federal election.⁴¹ The term "anything of
12 value" includes in-kind contributions, such as goods or services provided without charge or at a
13 charge that is less than the usual and normal charge for such goods or services.⁴² But the Act
14 exempts from the definition of expenditure "any news story, commentary, or editorial distributed
15 through the facilities of any broadcasting station, newspaper, magazine, or other periodical
16 publication, unless such facilities are owned or controlled by any political party, political

³⁹ See Jack Fink, *Ben Carson's Book Tour Stops in North Texas Attract Big Crowds*, CBS DALLAS/FORT WORTH (Oct. 20, 2015), <http://dfw.cbslocal.com/2015/10/20/ben-carsons-book-tour-stops-in-north-texas-attract-big-crowds/>.

⁴⁰ On October 7, he took part in one radio interview, and, it is unclear whether he was required to travel at all for it. See *Marketplace Radio* (Oct. 7, 2015), <http://www.marketplace.org/2015/11/17/elections/full-interview-dr-ben-carson-economy>. Further, on October 9 and 25, Carson travelled to Washington, D.C. and Iowa respectively to promote his book and participated in two television interviews that did not mention of the book. With respect to the first television interview, the interview occurred in the same city as the book tour event. See *The Brody Files* (Oct. 9, 2015), <http://blogs.cbn.com/thebrodyfile/archive/2015/10/09.aspx?mobile=false>. <http://www1.cbn.com/thebrodyfile/archive/2015/10/09/brody-file-exclusive-ben-carson-compares-mainstream-media-to-a>. With respect to the second, the location is unknown. See *Meet the Press* (Oct. 25, 2015), <https://www.nbcnews.com/meet-the-press/meet-press-october-25-2015-n451121>.

⁴¹ 52 U.S.C. § 30101(8)(A), (9)(A).

⁴² 11 C.F.R. § 100.52(d)(1).

1 committee, or candidate.”⁴³ This exclusion is generally referred to as the “press exemption” or
2 “media exemption.”⁴⁴

3 To determine whether the media exemption applies, the Commission first assesses
4 whether the entity that engaged in the challenged activity is a press entity.⁴⁵ If so, the exemption
5 applies so long as the entity (1) is not owned or controlled by a political party, political
6 committee, or candidate and (2) is acting within its “legitimate press function” in conducting the
7 activity that is the subject of the complaint.⁴⁶ If the exemption applies, the entity’s activities are
8 exempt from the Act’s disclosure, disclaimer, and reporting requirements.⁴⁷ The Commission
9 has long recognized that an entity otherwise eligible for the exemption “would not lose its
10 eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even
11 if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly
12 identified candidate for Federal office.”⁴⁸ The Commission also has determined that “where the
13 underlying product is covered by the press exemption, so are advertisements to promote that
14 underlying product.”⁴⁹

⁴³ 52 U.S.C. § 30101(9)(B)(i).

⁴⁴ Advisory Op. 2010-08 (Citizens United) at 3 (“AO 2010-08”).

⁴⁵ See, e.g., AO 2010-08; Advisory Op. 2005-16 (Fired Up!) (“AO 2005-16”); Advisory Op. 1996-16 (Bloomberg).

⁴⁶ *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

⁴⁷ AO 2010-08 at 7.

⁴⁸ AO 2005-16 at 6; Factual & Legal Analysis at 3, MUR 6579 (ABC News, Inc.) (July 5, 2012); see also AO 2010-08 (“While Citizens United’s films may be designed to further its principal purpose as a non-profit advocacy organization, an entity otherwise eligible for the press exemption does not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial.”).

⁴⁹ AO 2010-08 at 7.

1 1. Press Entity Status

2 Neither the Act nor Commission regulations define the term “press entity.”⁵⁰ In AO
3 2010-08 (Citizens United), the Commission explained that “when determining whether the term
4 applies to a particular entity, the Commission has focused on whether the entity in question
5 produces on a regular basis a program that disseminates news stories, commentary, and/or
6 editorials.”⁵¹ Further, while recognizing that an earlier Commission advisory opinion had
7 narrowly construed the exemption as not covering media that was not enumerated in the Act or
8 Commission regulations, such as a book,⁵² the Commission advised that in more recent advisory
9 opinions, it has applied the exemption broadly and applied the exemption “to ‘news stories,
10 commentaries, and editorials, *no matter in what medium they are published.*’”⁵³

11 Here, Penguin explains that it “is regularly engaged in the business of producing and
12 distributing books of all kinds and pays for the costs associated with promoting them.”⁵⁴ As
13 “the world’s largest English-language general trade book publisher,” including many publishing
14 groups and their imprints, which publish fiction and nonfiction, the company employs thousands
15 of people and publishes 70,000 digital and 15,000 print titles annually, with more than 100,000

⁵⁰ *Id.* at 5.

⁵¹ *Id.*

⁵² *Id.* at 4 (citing Advisory Op. 1987-08 (AIG/US News)).

⁵³ Advisory Op. 2008-14 (Melothe, Inc.) (“AO 2008-14”) at 3 (quoting *Explanation and Justification for the Regulations on Internet Communications*, 71 Fed. Reg. 18589, 18608-18609 (Apr. 12, 2006)) (emphasis in original). See also AO. 2010-08 (Citizens United) at 4 (concluding non-profit corporation engaged in production and distribution of films is a press entity).

⁵⁴ Penguin Resp. at 5.

eBooks available worldwide.⁵⁵ Based on this information, we conclude that Penguin qualifies as a press entity.

2. Ownership Criteria and Legitimate Press Function

It appears that Penguin also meets the final two criteria necessary to qualify for the press exemption. Penguin states that it is not owned or controlled by any political party, political committee or candidate,⁵⁶ and we are aware of no evidence to the contrary. As to whether a press entity is involved in its legitimate press function, the Commission has examined (1) whether the entity's materials are available to the general public and (2) whether the challenged materials are comparable in form to those ordinarily issued by the entity.⁵⁷ Both of those conditions appear to be met here.

First, there is no dispute that the book, which was a *New York Times* bestseller, was available to the general public. Further, the book appears to be comparable in form to other books previously published by Penguin's imprint, Sentinel, which has published "a wide variety of right-of-center books" on politics, history, and public policy.⁵⁸

⁵⁵ *Id.* at 2.

⁵⁶ Resp. at 6.

⁵⁷ See, e.g., AO 2010-08 at 6 (citing *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 250-51 (1986)); AO 2005-16.

⁵⁸ Penguin Resp. at 2. According to Sentinel's website, it has published other books by other prominent conservative figures, such as *Done Right Thing* by Mike Huckabee, *American Son* by Marco Rubio, and *A Patriot History of the United States* by Larry Schweikart and Mike Allen. See SENTINEL - PENGUIN BOOKS USA, <http://www.penguin.com/publishers/sentinel/>

1 Given that Penguin's publication of the book is covered by the media exemption, its
2 promotional efforts for the book would also be covered.⁵⁹ And Penguin's promotional activities
3 for Carson's book through a book tour, media interviews, and book signings, appear to be
4 comparable to business practices throughout the publishing industry when promoting a book.⁶⁰
5 To the extent that Carson discussed his candidacy during media interviews, the Commission has
6 previously determined that on-air interviews of candidates are within the media exemption.⁶¹
7 We therefore conclude that Penguin's payment of the costs with respect to the promotion of the
8 book, as well as other costs referenced in the Complaint, fall within the media exemption for
9 corporate contributions and expenditures and are exempt from the Act's disclosure, disclaimer,
10 and reporting requirements.⁶²

⁵⁹ See AO 2010-08 at 7 ("[C]ourts have held that where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product") (citing *FEC v. Phillips Publ'g*, 517 F. Supp. 1308, 1313 (D.D.C. 1981)).

⁶⁰ *Id.* at 5; see also Advisory Op. 2014-06 (Ryan) at 1-2 (Commission noted as a factual matter that Congressman Ryan would participate in the promotion of his book by appearing in a book tour that would include book signings and media appearances). Moreover, in the Advisory Opinion Request, the requestors noted that "it can be safely assumed that as part of this promotional book tour, news media will ask Congressman Ryan questions that are campaign- and election-related in nature." AOR 2014-06 at 14. Consequently, the facts developed in AO 2014-06 further suggest that Penguin's promotional activities conform to the standard practices for publishing books authored by candidates and public officials.

⁶¹ See Advisory Op. 2005-19 (Inside Track) at 4, n.4; Advisory Op. at 2004-07 (Music Television) at 6.

⁶² Penguin's payments for the book tour also appeared to be covered by the bona fide commercial activity exception to the definition of contribution. In determining whether activity is bona fide commercial activity, the Commission has identified a number of factors, including: "(1) whether the sales of the merchandise involve fundraising activity or solicitations for political contributions; (2) whether the activity is engaged in by the vendor for genuinely commercial purposes and not for the purpose of influencing an election; (3) whether the items are sold at the vendor's usual and normal charge; and (4) whether the purchases are made by individuals for their personal use." Advisory Op. 2014-06 (Ryan) at 9; First Gen. Counsel's Rpt. ("FGCR") at 14, MUR 5474/5539 (Dog Eat Dog Films, Inc.) (May 25, 2005); see also Advisory Op. 1994-30 (Conservative Concepts); Advisory Op. 1989-21 (Create-A-Craft). Here, the facts indicate that Penguin promoted the book for commercial purposes. We have found no evidence that Penguin sold the book at below the market rate, and the book appears to have been widely sold to the public given that the book reached the New York Times Bestseller's List in October and November 2015. Further, there is no information that sales of the book involve fundraising activity or solicitations for political

1 With respect to Carson's appearance at the National Press Club, the Carson Respondents
2 state that the National Press Club ("NPC"), a press entity, invited Carson to speak there at an
3 event moderated by the President of the NPC, who is a professional journalist, and paid for all
4 promotional costs related to this event, including hotel and food.⁶³ Further, the Carson
5 Respondents provide additional evidence indicating that it was customary for the National Press
6 Club, a press entity, to invite a candidate to speak at the club, and to advertise any recently
7 published book authored by such candidate.⁶⁴ Thus, the costs for promoting the book at the
8 National Press Club also are covered by the media exemption.

9 **B. Carson's Campaign-Related Activities During the Book Tour Appear to Be**
10 **De Minimis**
11

12 The media exemption does not cover all activities conducted by a media entity, and the
13 Commission and courts have acknowledged that media entities may forfeit that exemption if they
14 engage in certain core election-related activities unrelated to their ordinary press functions. In
15 *FEC v. Massachusetts Citizens for Life* ("MCFL"), the Supreme Court held that a "Special
16 Edition" of a newsletter did not qualify for the media exemption because it deviated from certain
17 "considerations of form" relating to the production and distribution of the organization's regular
18 newsletter.⁶⁵ The Court noted that MCFL did not publish the "Special Edition" through the
19 facilities of the regular newsletter but with staff who prepared no previous or subsequent

contributions. To the contrary, as described above, it appears that Penguin structured the book tour to keep it separate from campaign events.

⁶³ Carson Resp. at 22; Supp. Carson Resp. at 1.

⁶⁴ Supp. Carson Resp. at 1.

⁶⁵ 479 U.S. at 250-51.

1 newsletters, and distributed it to a much larger audience than the newsletter's regular audience.⁶⁶
2 Similarly, in *Reader's Digest Ass'n v. FEC*, the court indicated that the press exemption "would
3 seem to exempt only those kinds of distribution that fall broadly within the press entity's
4 legitimate press function."⁶⁷ Thus, for example, the exemption would not apply where, "on
5 Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand
6 on street corners denouncing allegedly illegal acts of a candidate and sent sound trucks through
7 the streets blaring the denunciation, all in a matter unrelated to the sale of its newspapers."⁶⁸

8 The Commission also has advised that the legitimate media function is "'distinguishable
9 from active participation in core campaign or electioneering functions.'"⁶⁹ For example,
10 producing independent expenditure advertisements for a political committee,⁷⁰ paying the
11 administrative costs of a political committee,⁷¹ engaging in get-out-the-vote activities,⁷² and
12 preparing briefings for campaign volunteers⁷³ would not constitute legitimate press functions.
13 Thus, even if an entity is deemed to be a press entity, if it were to act in a manner atypical of a

⁶⁶ *Id.* at 251.

⁶⁷ 509 F. Supp. at 1214.

⁶⁸ *Id.*

⁶⁹ Advisory Op. 2011-11 (Viacom, Inc.) at 8 ("AO 2011-11") (citing AO 2008-14 at 5).

⁷⁰ AO 2011-11 at 9.

⁷¹ *Id.*

⁷² AO 2008-14 at 5.

⁷³ *Id.* at 6 ("Because the provision of personnel to benefit a political campaign is not a legitimate press function, if Melothé, Inc. staffers were to prepare and deliver daily briefings to campaign volunteers, a prohibited in-kind contribution or expenditure would result from the corporation.").

1 press entity in the way in which it engages in core electioneering activities, the media exemption
2 will not shield that particular conduct.

3 In this matter, the Complaint alleges that Penguin may have actually paid for campaign
4 events when the Committee "sandwiched" campaign events between promotional book tour
5 events. If Penguin actually paid for the costs of Carson's campaign activity, the media
6 exemption would not apply to those activities.

7 Here, the Carson Respondents acknowledge that Carson attended some campaign-related
8 meetings during the limited personal time scheduled on some book tour days, though they
9 provide no specifics about such events. They have, however, provided sworn statements that all
10 expenses related to those meetings were paid for by the Committee. While we do not have
11 specific information as to how the Committee determined which costs were campaign-related, or
12 how they allocated shared costs during the weeks of the book tour, it appears that such campaign
13 activity was not extensive.⁷⁴

14 With respect to the one day, October 18, 2015, on which Carson appears to have attended
15 several book tour events in Houston, The Woodlands, and San Antonio, Texas and travelled to a
16 campaign event in Plano, Texas,⁷⁵ the Committee should have ensured that campaign costs are

⁷⁴ See *supra* p. 5 (stating that during book tour weeks, Carson had only small blocks of unscheduled time).

⁷⁵ According to publicly available information, on October 18, 2015, Carson made a book tour event appearance at the Fallbrook Church in Houston, Texas, see <http://cw39.com/2015/10/18/ben-carson-visits-fallbrook-church-in-houston/>; attended a book signing event at the Barnes and Noble bookstore in The Woodlands, Texas, starting at 2:30 pm, see <http://www.woodlandsjournal.com/event/dr-ben-carson-a-more-perfect-union-book-signing-at-barnes-and-noble-the-woodlands/>, made an appearance at a campaign event at the North Texas Presidential Forum hosted by Prestonwood Baptist and the Faith and Freedom Coalition in Plano, Texas, sometime after 3 pm, see <http://dfw.cbslocal.com/2015/09/30/presidential-candidates-headline-forum-at-north-texas-megachurch/>, and attended another book signing at a Books-A-Million bookstore in San Antonio, Texas, at 9:00 pm, see <http://www.mysanantonio.com/news/local/article/GOP-presidential-candidate-Ben-Carson-will-be-in-6574672.php>. Given the driving distances between The Woodlands and Plano (three-and-a-half hour drive) and Plano and San Antonio (five-hour drive), Carson likely took a flight to and from the event in Plano, and in fact, a news report of the

1 borne by the campaign and non-campaign costs are borne by the entity responsible for such
2 costs.⁷⁶ Where an authorized committee pays for the promotional costs of a candidate's book
3 published by a commercial publisher that pays royalties to the candidate, the Commission has
4 determined that those payments will constitute a prohibited personal use under 52 U.S.C.
5 § 30114(b).⁷⁷ Thus, Penguin should have paid for expenses related to the book tour events in
6 Houston, The Woodlands, and San Antonio, and the Committee should have paid for the travel
7 costs associated with the flight to and from Plano for the campaign event. The Carson
8 Respondents generally assert in sworn statements by Jones and Yates that the Committee paid
9 for all campaign related expenses. We note, however, that they did not provide specific
10 information showing that the Committee paid for expenses related to the trip to Plano, and it is
11 not possible to determine from the face of the Committee's disclosure reports whether the
12 Committee made any such payments. Nevertheless, based on the sworn statements, and the fact
13 that the cost of the single intrastate flight and any other costs related to the Plano trip were likely
14 *de minimis*, we do not recommend that the Commission pursue any possible violation stemming

book signing in San Antonio confirms that Carson's plane arrived at 8 pm. *See*
<http://www.mysanantonio.com/news/local/article/GOP-presidential-candidate-Ben-Carson-will-be-in-6574672.php>.

⁷⁶ In Advisory Opinion 2002-05 (Hutchinson), the Commission determined that where a candidate, who was also the mayor of an incorporated city, traveled to Washington, D.C. for an eight day trip where she would conduct federal campaign activity, as well as city and personal business, campaign funds should be used to pay those expenses of the trip relating to campaign-related activities but not for expenses relating to city business. With respect to airfare for the trip, the Commission concluded that such expense "represents a defined expense that would have existed irrespective of any personal or campaign related activities," and the entire cost of the airfare could be paid by the city.

⁷⁷ *See* Advisory Op. 2011-02 (Brown) (authorized committee would avoid violating personal use provisions so long as it posted *de minimis* amount promotional material of candidate's book on campaign website); Advisory Op. 2006-07 (Hayworth) (same). *See also* Factual and Legal Analysis at 4, MUR 6127 (Obama for America) (where campaign pays for travel that involves both personal and campaign activities, incremental expenses resulting from personal activities are personal use unless reimbursed by the candidate under 11 C.F.R. § 113.1(g)(1)(ii)(C)).

1 from the campaign trip to Plano.⁷⁸ With respect to the book tour days on which Carson also
2 participated in radio and television interviews that discussed his candidacy but not the book, the
3 available information does not indicate that Carson made separate trips that would have would
4 have involved significant costs.⁷⁹

5 Finally, as further support that Carson impermissibly engaged in campaign activity
6 during the book tour, the Complaint cites to a news article to allege that Carson accepted a \$500
7 campaign contribution at a book tour event in Waco, Texas.⁸⁰ Penguin states that there were no
8 solicitations for contributions at the book signing events and the news story relied upon by the
9 Complaint is ambiguous as to whether Carson knew that the envelope contained a contribution.⁸¹
10 The Carson Respondents do not address this allegation.

11 As Penguin contends, the news report cited by the Complaint does not indicate that
12 Carson solicited any contributions at the book tour event in question. In fact, the article states,
13 “[a]s Carson signed books in the fast moving line, one young man handed the candidate an
14 envelope, which the candidate put in his breast pocket; he later told MSNBC that it was a \$500

⁷⁸ See Factual and Legal Analysis at 5, MUR 6127 (Obama for America) (dismissing allegation that campaign improperly paid for personal travel based, in part, on small amount in violation).

⁷⁹ See *supra* note 40. Further, as discussed above, on-air television appearances are covered by the media exemption. See *supra* note 61.

⁸⁰ Compl. at 3, citing Jane Trim, “On Carson’s Book Tour, Politics and Business are Blurred,” MSNBC (Oct. 20, 2015), <http://www.msnbc.com/msnbc/carsons-book-tour-politics-and-business-are-blurred>. While not referenced by the Complaint, the article notes that the “pro-Carson super PAC The 2016 Committee” appeared at the book tour event and distributed materials “advertising” Carson’s stance on issues and that some super PAC volunteers mistakenly claimed they were with the campaign. *Id.* The article, however, acknowledges that The 2016 Committee “has been disavowed by the campaign in the past,” and does not provide any facts indicating that the super PAC worked in concert with the Carson committee. *Id.* Further, the article notes that the Carson Committee stated that it did not send campaign staff to book tour events. *Id.* Accordingly, given that the article does not provide a basis to conclude that The 2016 Committee impermissibly coordinated its activities with the Carson Committee, we make no recommendation as to these facts.

⁸¹ Penguin Resp. at 6.

1 donation and a resume, as he hopes to work for the candidate.”⁸² Based on the article’s
2 description of the incident, it appears that Carson did not have much time to engage with book
3 event attendees, let alone solicit campaign funds, and did not discuss the contents of the envelope
4 with the contributor. Moreover, the incident involved a single \$500 contribution and is thus a *de*
5 *minimis* amount in violation.

6 C. Conclusion

7 Under the circumstances presented in this matter, we do not believe that the Complaint’s
8 allegations regarding Carson’s book tour merit further use of Commission resources to conduct
9 an investigation. As described above, Penguin’s payments for the promotional activities of
10 Carson’s book are covered by the media exemption and do not constitute contributions. Further,
11 the evidence indicates that Penguin took steps to separate book tour events from campaign events
12 by scheduling the book tour events on alternate weeks. To the extent that Penguin may have
13 inadvertently paid for activities which extended beyond the scope of media exemption, such
14 payments appear to be *de minimis*. Accordingly, we recommend that the Commission dismiss
15 the allegations that Penguin Random House LLC violated 52 U.S.C. §§ 30116(a) or 30118(a) by
16 making excessive or prohibited contributions and that Benjamin Carson and Carson America,
17 Inc. and Logan D. Delany, Jr., in his official capacity as treasurer violated 52 U.S.C. §§ 30116(f)
18 or 30118(a) by knowingly accepting excessive or prohibited contributions.⁸³

⁸² Trim, *supra* note 80.

⁸³ 470 U.S. 821 (1985).

IV. RECOMMENDATIONS

1. Dismiss the allegation that Benjamin Carson, Sr., Carson America, Inc. and Logan D. Delany, Jr., in his official capacity as treasurer violated 52 U.S.C. §§ 30116(f) or 30118(a).
2. Dismiss the allegation that Penguin Random House LLC violated 52 U.S.C. §§ 30116(a) or 30118(a).
3. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.
6. Close the file.

Lisa J. Stevenson
Acting General Counsel

10/20/17
Date

BY: Kathleen M. Guith
Kathleen M. Guith
Associate General Counsel
for Enforcement

Jin Lee
Jin Lee
Acting Assistant General Counsel

Dominique Dillenseger by JD
Dominique Dillenseger
Attorney

Attachment:

1. Factual and Legal Analysis